

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS
FEB 8 1999

IN THE MATTER OF:

DOCKET NUMBER: 96-03293

[REDACTED]
[REDACTED]
COUNSEL: NONE

HEARING DESIRED: NO

APPLICANT REQUESTS THAT:

His administrative discharge, under the provisions of AFI 36-3207, be set aside and that he be granted a disability discharge, under the provisions of AFI 36-3212.

APPLICANT CONTENDS THAT:

His commander was told to prefer charges against him even though she (commander) stated and documented that he (applicant) had self-identified a drug abuse problem. Applicant states that his commander recommended resignation in lieu of charges. However, this request was denied in order to punish him. In August of 1995 administrative actions were preferred against him even though in April of that year he had a major depressive episode and was to be medically discharged. He states that "serious recurring misconduct" is on his record even though his service is characterized as honorable. The prejudice of the Wing Commander is further demonstrated by the order not to re-enter Fairchild Air Force Base (AFB).

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

Applicant was appointed a first lieutenant in the Reserve of the Air Force on 22 February 1993 and ordered to voluntary active duty on 17 March 1993 for a period of 48 months.

Applicant was working as a Staff Nurse, Special Care Unit assigned to the 92d Medical Group, Fairchild Air Force Base (AFB), Washington.

In July 1994, applicant called his supervisor and informed her that for the previous six to eight months he had taken drugs out of the drug cabinet. An investigation was initiated based on information received indicating applicant had notified his supervisor that he had been illegally using narcotics.

The Air Force Office of Special Investigations (AFOSI) investigated the matters of failure to obey an order or regulation; drunk on duty; wrongful use of a controlled substance; and, military property of the United States - sale, loss, damage, destruction, or wrongful disposition. The AFOSI investigation period of report was from 1 August - 4 October 1994. The investigative status was referred to command for action.

On 2 August 1995, applicant's commander recommended to the Wing Commander, that action under AFI 36-3206 be initiated against the applicant. The reasons were: (a) Between on or about 1 December 1993 and 1 August 1994, applicant did, on divers occasions, wrongfully steal meperidine (brand name Demerol), military property of a value of less than \$100.00; (b) Between on or about 1 December 1993 and 1 August 1994, applicant did, on divers occasions, wrongfully use meperidine, military property of a value of less than \$100.00; (c) Between on or about 12 July 1994 and 29 July 1994, on divers occasions, applicant did, with intent to deceive, sign an official record, AF Form 579, Controlled Substance Register, which record was false, in that it did not accurately reflect the quantity of meperidine the applicant administered to patients, and was then known to be false; and (d) Between on or about 1 December 1993 and 1 August 1994, applicant did, on divers occasions, without proper authority, willfully damage, by diluting with saline solution, the drug meperidine, military property of a value of less than \$100.00.

On 2 August 1995, the Wing Staff Judge Advocate reviewed the proposed separation action and found it legally sufficient to support involuntary action for serious or recurring misconduct punishable by military or civilian authorities and drug abuse. At issue was whether the applicant was capable of rehabilitation. The Commander recommended separation and did not believe rehabilitation efforts were warranted.

On 2 August 1995, the applicant received notification from the Wing Commander that action was being initiated against him under AFI 36-3206. The applicant acknowledged receipt of the notification action on 2 August 1995.

On 18 August 1995, applicant responded indicating that he would comment and submit documentation in his behalf and indicated that he had been counseled by the Area Defense Counsel (ADC).

On 24 August 1995, the Chief, General Law Division, Headquarters Air Mobility Command (HQ AMC/JAM), reviewed the initiated discharge action and stated that the involuntary separation action originally began as a General Court-Martial action. A military judge dismissed the charges that had been referred to trial. The military judge found that applicant's initial disclosure of his illicit drug activities constituted self-identification of drug abuse under AFI 36-2701. As a result, the

disclosures could not be used as the basis for prosecuting the applicant for violations of the Uniform Code of Military Justice (UCMJ). While the military judge's finding probably should be conclusive on the issue of "self-identification," it does not preclude administrative separation action based on the information applicant disclosed. In cases where AFI 36-3206, paragraph 3.6.4 (serious misconduct), is a basis for discharge, a discharge under other than honorable conditions is authorized. However, the Wing Commander notified the applicant that he could receive no less than an honorable discharge if separated. The discharge case file contains sufficient evidence to warrant recommending that the Air Force discharge applicant.

In a narrative summary, dated 11 August 1995, Doctor J. B. B---, Chief, Mental Health Services, indicated the applicant responded well to initial inpatient and on-going outpatient mental health treatment for a major episode of depression associated with mood congruent psychotic symptoms. It was projected that applicant would complete an intensive outpatient Veterans Administration (VA) substance dependent treatment program in the next one to two months. Allowing him to complete this VA treatment program would provide him with optimal substance abuse treatment before discharge. He would continue to receive comprehensive outpatient mental health services at the Fairchild AFB mental health clinic.

On 14 September 1995, a Medical Evaluation Board (MEB) was convened at Travis AFB, California for the purpose of evaluating applicant's medical condition. The MEB established the following diagnosis: AXIS I Major Depressive Disorder, Single Episode, approximate date of origin April 1995; MIL IMP: Marked, CIV IMP: Definite; Opioid Dependence, approximate date of origin 1993. AXIS II No diagnosis (prominent obsessive/compulsive, dependent and avoidant traits noted), existed prior to service (EPTS). The MEB recommended the case be forwarded to the Informal Physical Evaluation Board (IPEB).

On 19 September 1995, the Vice Commander, HQ AMC, recommended applicant be discharged with an honorable discharge and that his case be forwarded to the Air Force Personnel Board for further action.

The IPEB convened on 6 October 1995 and found the following diagnosis: Major depressive disorder, single episode, with definite industrial impairment. Other diagnoses considered but not ratable: Opioid dependence, in sustained full remission, personality disorder; psychosocial and environmental stressor problems. The IPEB recommended temporary retirement with a rating of 30%. On 30 October 1995, the applicant disagreed with the findings and requested a formal hearing. On 17 November 1995, the applicant requested a waiver of his election to a Formal Physical Evaluation Board (FPEB). His request for a waiver was disapproved on 17 November 1995 by the President, FPEB.

On 21 November 1995, a FPEB convened and found the diagnoses to be: Major depressive disorder, single episode, with mild social and industrial impairment. Other diagnoses considered but not ratable: Opioid dependence, in full remission; personality disorder; psychosocial and environmental stressor problems; history of marital problems. The FPEB's recommended disposition was discharge with severance pay with a 10% compensable rating. Applicant disagreed with the findings and recommended action of the formal PEB hearing and submitted a rebuttal.

Applicant's case was forwarded to the Secretary of the Air Force Personnel Council (SAFPC) for consideration of discharge under AFI 36-3206 (Administrative Discharge Procedures) (Drug Abuse) and AFI 36-3212 (Physical Evaluation for Retention, Retirement, and Separation) - Dual Action. On 20 February 1996, the Secretary of the Air Force, by direction of the President, ordered the appointment of applicant, as a Reserve officer, be terminated pursuant to AFI 36-3207 (Separating Commissioned Officers), and directed the applicant be discharged with an honorable discharge.

Applicant was honorably discharged on 8 March 1996 under the provisions of AFI 36-3207 (Unacceptable Conduct) in the grade of captain. He served 2 years, 11 months and 21 days of active military service. (Applicant served 4 years of prior active service in the U. S. Navy).

AIR FORCE EVALUATION:

The Chief, Physical Disability Division, AFPC/DPPD states that a thorough review of the case file revealed no errors or irregularities in the processing of the applicant's case within the disability evaluation system. He was appropriately found unfit for continued military service and properly rated under federal disability rating guidelines. Applicant was afforded all rights to which he was entitled under disability law and departmental policy. The SAFPC determination to terminate disability processing in order to effect administrative discharge action was done in accordance with Air Force policy. They recommend denial of applicant's request.

A complete copy of the Air Force evaluation is attached at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

A copy of the Air Force evaluation was forwarded to the applicant on 27 May 1997 for review and response within 30 days. The applicant did not respond.

ADDITIONAL AIR FORCE EVALUATION:

The Separations Branch, HQ AFPC/DPPRS, stated that the applicant's case has been reviewed for separation processing and there are no errors or irregularities causing an injustice to the applicant. The reason for discharge is appropriate and complies with directives in effect at the time of his discharge. Applicant did not identify any specific errors in the discharge processing nor provide facts which warrant his administrative discharge be set aside. They recommend the request be denied.

A complete copy of the additional Air Force evaluation is attached at Exhibit E.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION

Applicant states, in summary, that the Air Force broke promises made in AFI 36-2701 that outlines the Substance Abuse Control Program. Both the letter and spirit of this instruction was disregarded in his case. He alleges the Air Force wrongfully withheld vital medical care that was recommended by the base psychiatrist. The Air Force wrongfully used administrative action against him for "severe, recurring misconduct that is punishable by law." The documented facts show that he was denied appropriate medical treatment for over a one-year period and his condition worsened as a result.

A complete copy of applicant's response, with attachments, is attached at Exhibit G.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was timely filed.
3. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. After a thorough review of the evidence of record and applicant's submission, we are not persuaded that his administrative discharge should be changed to a disability discharge. Applicant's contentions are duly noted; however, we do not find these assertions, in and by themselves, sufficiently persuasive to override the rationale provided by the Air Force. The applicant alleges that the Air Force withheld vital medical care and that his commander failed to follow regulations in providing that medical care. However, after an inquiry by the Wing

Inspector General, the allegations were unsubstantiated. It appears by the evidence of record that the applicant was afforded the appropriate medical care. He also alleges that the Air Force wrongfully used administrative action against him for severe, recurring misconduct that is punishable by law. We note that when court-martial charges were preferred against him, the military judge dismissed the charges because he found that the initial disclosure of the applicant's illicit drug activities constituted self-identification of drug abuse under regulation. However, that finding did not preclude administrative separation action based on the information applicant disclosed. The fact remains that the applicant did abuse drugs and there was sufficient evidence to warrant an administrative discharge. We therefore agree with the recommendations of the Air Force and adopt the rationale expressed as the basis for our decision that the applicant has failed to sustain his burden that he has suffered either an error or an injustice. Therefore, we find no compelling basis to recommend granting the relief sought.

THE BOARD DETERMINES THAT:

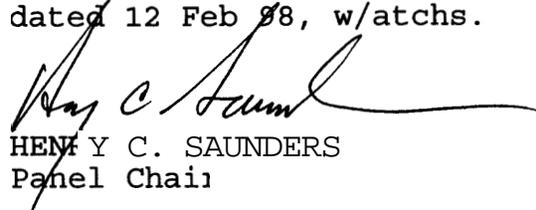
The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

The following members of the Board considered this application in Executive Session on 17 November 1998, under the provisions of AFI 36-2603.

Mr. Henry C. Saunders, Panel Chair
Mr. Henry Romo Jr., Member
Dr. Gerald B. Kauvar, Member

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 2 Aug 96, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFPC/DPPD, dated 9 May 97.
- Exhibit D. Letter, AFBCMR, dated 27 May 97.
- Exhibit E. Letter, HQ AFPC/DPPRS, dated 21 Jan 98.
- Exhibit F. Letter, AFBCMR, dated 9 Feb 98.
- Exhibit G. Applicant's Letter, dated 12 Feb 98, w/atchs.


HENRY C. SAUNDERS
Panel Chair